Supreme Court, U.S.
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No.

in the

Supreme Court

of the

United States

LONNIE MCKISSIC,

Petitioner.

vs.

THOMAS BIRKETT, Warden

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

I.

Does a federal plea agreement, which requires cooperation with state authorities, compel a defendant to provide grand jury testimony, such that his testimony cannot be deemed voluntary under state immunity statutes?

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The Petitioner, Lonnie McKissic, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on October 5, 2006.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported (Case No. 05-1425) That determination is attached hereto in Appendix 1. The District Court's opinion denying habeas relief is also unreported, and is attached hereto as Appendix 2.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 5, 2006. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Michigan Comp. Law § 750.157 states in part

> No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this chapter, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to degrade or incriminate him; *but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise*, and no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial: provided, that no person so testifying shall be exempt from federal prosecution and punishment for perjury committed in so testifying.

STATEMENT OF THE CASE

The Petitioner herein, Lonnie McKissic, is seeking certiorari from the denial of a motion filed pursuant to 28 U.S.C. § 2254, and subsequent appeal to the Sixth Circuit Court of Appeals. (Appendix 1)

In 1994, as a result of a state and federal investigation, the Petitioner was charged in federal court with drug trafficking and money laundering charges relating to drug trafficking in the Lansing, Michigan area in 1993. As a result of this federal indictment, the Petitioner agreed to plead guilty to one count of money laundering. The Petitioner also agreed to cooperate with authorities. Specifically, his federal plea agreement required the Petitioner to "fully cooperate with the United States Drug Enforcement Administration, the Federal Bureau of Investigation Division, the Internal Revenue Service Criminal Investigation Division, the United States Attorney's Office, the Michigan State Police and any other law enforcement agency in the investigation of past crimes over which they have actual or apparent jurisdiction."

As part of that cooperation, the Petitioner in 1995 was writted from federal custody to state custody, to appear at the grand jury proceedings against one Thomas Patrick. At the grand jury, the Petitioner was informed by the prosecutor that "With respect to the testimony that you give before this grand jury, nothing you say in that testimony will be used against you unless we find at some future time that you have lied before this grand jury." The Petitioner then testified, implicating himself and Mr. Patrick.

However, as Mr. Patrick's case progressed, the Petitioner had a change of heart. At Mr. Patrick's preliminary hearing and at his trial, the Petitioner continued to implicate himself, but did not implicate Patrick. As a result, the Petitioner was charged in state court based upon the

information he provided as a result of his grand jury testimony. The Petitioner moved to dismiss the charges, contending that they were in violation of his immunity agreement. The trial court disagreed. Thereafter, at the Petitioner's trial, the state was permitted to play before the jury the Petitioner's testimony in Patrick's case in which he implicated himself. The Petitioner was convicted, and was sentenced to a total term of 70 to 110 years incarceration.

ARGUMENT

1. The Petitioner was required to testify at state grand jury proceedings; thus, his testimony was entitled to transactional immunity

In 1994, the Petitioner entered into a plea agreement with the federal government to plead guilty to various drug related charges. As part of that agreement, the parties agreed to "fully cooperate with the United States Drug Enforcement Administration, the Federal Bureau of Investigation Division, the Internal Revenue Service Criminal Investigation Division, the United States Attorney's Office, the Michigan State Police and any other law enforcement agency in the investigation of past crimes over which they have actual or apparent jurisdiction." Pursuant to his commitment, the Petitioner testified in Michigan state court at a grand jury in 1995. At the grand jury, the prosecutor told the Petitioner "With respect to the testimony that you give before this grand jury, nothing you say in that testimony will be used against you unless we find at some future time that you have lied before this grand jury." The Appellant then testified, implicating himself and Mr. Patrick. The Petitioner submits that the combination of his federal plea agreement and the promises made by the state prosecutor conferred transactional immunity on the Petitioner, such that the crimes he admitted to as part of that grand jury process could not later be the subject of prosecution.

The theory of transactional immunity pre-dates the Federal Constitution, and was certainly recognized by this Court as far back as *Brown v. Walker*. 161 U.S. 591 (1896) "Transactional immunity [] accords full immunity from prosecution for the offense to which the compelled testimony relates . . ." *Kastigar v. United States*, 406 US 441,453 (1972) On the other hand "Granting use immunity does not preclude prosecution; it merely prevents the State from using an inmate's

own words, and the fruits thereof, against him in a subsequent prosecution". *McKune v. Lile*, 536 U.S. 24,70 (2002)

The Petitioner submits that the federal plea agreement compelled his performance at the state grand jury. Thus, Michigan statutes, as well as the promises of the state prosecutor, granted the Petitioner transactional immunity. The Sixth Circuit, in denying this argument, relied on the fact that the Petitioner's testimony was not "compelled", because it was voluntarily made as a result of the federal plea agreement. However, this argument is without merit. Taking the Sixth Circuit's decision to its logical conclusion, any time a defendant would enter into an agreement, and was later brought before a state court for questioning, the defendant would need to invoke the Fifth Amendment during such questioning. Doing so would be in direct contradiction to the federal plea agreement. Thus, a criminal defendant is stuck with a Hobbesian choice: testify pursuant to the agreement and risk state prosecution; or invoke one's Constitutional rights and risk withdrawal of the federal plea agreement. The Constitution cannot compel such an absurd result.

The Sixth Circuit relied on the case of *United States v. Camp*, 72 F.3d 759 (9th C. 1995) for the proposition that a plea agreement with one sovereign does not create compulsion for testifying before another. However, in *Camp*, the Ninth Circuit noted "the record does not suggest that any negative consequences would have followed if Gene had invoked the privilege." *Id.* at 761 Here, there were certainly negative consequences if the Petitioner invoked the privilege: he would have been in direct violation of his plea agreement.

Further, such a ruling ignores this Court's holding in the case of *Murphy v. Waterfront Commission of New York Harbor*. 378 U.S. 52 (1964) In *Murphy*, the issue was whether testimony compelled pursuant to a state immunity agreement could be used by federal prosecutors to obtain a conviction.

The federal authorities argued that nothing in the state agreement prohibited their use of the evidence. This Court disagreed, finding "We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." *Id.* at 78 Thus, this Court recognized the Catch 22 which occurs when one jurisdiction enters into an agreement which binds a defendant to cooperate with other jurisdictions, and the interplay between that agreement and the Fifth Amendment.

This Court should also consider the Petitioner's physical circumstances in determining whether the Petitioner's testimony before the state grand jury was voluntary. The Petitioner was brought to the grand jury via writ, from federal custody. He did not drive himself to the grand jury, and after his testimony, he was placed back into shackles and returned to federal custody. There was nothing "voluntary" about his presence or cooperation.

Finally, the Sixth Circuit's opinion ignores the fact that the promise of the state prosecutor was independent of the federal plea agreement. Even if the Petitioner was "voluntarily" present at the grand jury, the Petitioner was informed, without reservation, that he would not be prosecuted on any crimes he testified to at that hearing, and only faced perjury charges if he perjured himself. Under such circumstances, regardless of the Petitioner's status as a voluntary participant or indentured servant, his testimony was immunized. As such, no subsequent prosecution could occur.

The Petitioner also submits that Michigan law at the time of his grand jury testimony served to immunize him from prosecution. At the time the Petitioner testified before the state grand jury, Michigan law had a transactional immunity statute which read, in part, that:

> No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this chapter, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to degrade or incriminate him; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial: provided, that no person so testifying shall be exempt from federal prosecution and punishment for perjury committed in so testifying.

This statute makes it clear that the testimony which the Petitioner gave during the grand jury of Mr. Patrick, which was compelled both by his federal plea agreement and by the promises of the state prosecutor, was privileged under this statute. Accordingly, under its own laws, the State could not have prosecuted him for the subject matter contained in his grand jury testimony.

"The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants." *United States v. Verdugo-Urquidez*, 494 U.S. 259,264 (1990) "This command of the Fifth Amendment ("nor shall any person . . . be compelled in any criminal case to be a witness against himself . . . .") registers an important advance in the development of our liberty -- one of the great landmarks in man's struggle to make himself civilized. . . . The privilege

against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application." *Ullmann v. United States*, 350 U.S. 422,427 (1956)

In the present case, the Petitioner was denied this privilege. The federal plea agreement, the promise of the state prosecutor, and Michigan law all compelled the Petitioner to implicate himself and Mr. Patrick at the grand jury. Once given, the promises made provided transactional immunity as to any statements made during that grand jury. The Petitioner was not required to invoke his Fifth Amendment privilege, nor was he permitted to by the plea agreement. Accordingly, his subsequent indictment and conviction on drug charges which were admitted to during the grand jury violated the Petitioner's Fifth Amendment rights, and as such, his convictions must be vacated.

CONCLUSION

The Petitioner requests that this Court reverse the findings of the Court of Appeals and the district court, and remand for dismissal of the indictment.

Respectfully submitted,

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APPENDIX

1. Court of Appeals Decision
   October 5, 2006

2. District Court Decision
   February 24, 2005

LONNIE McKISSIC, Petitioner-Appellant, v. THOMAS BIRKETT, Warden, Respondent-Appellee.

No. 05-1425

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06a0739n.06;
2006 U.S. App. LEXIS 25423

October 5, 2006, Filed

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

JUDGES: BEFORE: DAUGHTREY, COLE, and GIBBONS, Circuit Judges.

OPINION BY: R. GUY COLE, JR.

OPINION: R. GUY COLE, JR., Circuit Judge.
Petitioner-Appellant Lonnie McKissic appeals the district court's dismissal of his petition for habeas corpus relief under 28 U.S.C. § 2254. McKissic was convicted in Michigan state court of various drug-related charges, and he challenges his conviction on four grounds: (1) he was immune from prosecution because of a Michigan immunity statute and an earlier plea agreement with federal prosecutors regarding the drug-related conduct; (2) the State waited five years to prosecute him, violating his right to be free of prejudicial pre-indictment delay; (3) the State engaged in prosecutorial misconduct by introducing several witnesses' plea agreements into evidence; and (4) given his federal plea agreement, his

conviction violates double-jeopardy principles. For the reasons that follow, we AFFIRM the district court's order dismissing McKissic's petition for habeas corpus relief.

I. BACKGROUND

In February 1994, McKissic was indicted in federal court on drug-trafficking and money-laundering charges. In June 1994, McKissic reached a plea agreement with the federal prosecutor. The agreement called for McKissic to plead guilty to the money-laundering charge and cooperate with law-enforcement agencies in their investigation of past crimes. This cooperation required McKissic to give truthful answers to all investigators' questions and provide truthful testimony at grand juries and trials. In return for McKissic's cooperation, the federal prosecutor agreed to dismiss the other pending charges against McKissic, not to bring additional charges against him related to the underlying drug trafficking, and to make certain sentencing recommendations in his favor. In August 1994, McKissic pleaded guilty to the money-laundering charge and, after the prosecutor's recommendation of a downward departure, was sentenced to nine years in federal prison.

On February 29, 1995, in accordance with his plea agreement, McKissic testified at Thomas Patrick's grand-jury proceedings in Michigan state court. McKissic's testimony implicated Patrick and himself in the sales of large amounts of cocaine. In November 1995, however, McKissic testified at Patrick's preliminary examination that Patrick was not involved in any drug sales. McKissic then offered similar testimony at Patrick's trial. The federal prosecutor deemed McKissic's contradictory testimony a failure to cooperate under the federal plea agreement, and, in January 1996, the prosecutor moved to withdraw the downward departure in McKissic's sentence.

In April 1998, the State charged McKissic in state court with perjury and various drug-trafficking offenses related to the same conduct underlying the earlier federal charges against

him. The state drug-trafficking charges involved delivery, possession, and conspiracy to deliver more than 650 grams of cocaine. Following a bench trial on the drug charges, n1 McKissic was convicted of each charge. On November 9, 1999, McKissic was sentenced as a four-time habitual offender to consecutive prison terms on each charge, for a total term of 70 to 110 years.

n1 The State brought the perjury charge in a separate proceeding, and it is not a subject of McKissic's habeas petition or appeal to this Court.

McKissic then appealed to the Michigan Court of Appeals, which affirmed his conviction and sentence. The Michigan Supreme Court denied his application for leave to appeal. McKissic filed a petition in the district court for habeas corpus relief under 28 U.S.C. § 2254, raising variations of the claims he brought in state court. The district court dismissed McKissic's petition with prejudice and declined to issue a certificate of appealability. This Court then granted McKissic a certificate of appealability on the four issues he raises in this appeal.

II. DISCUSSION

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), applies to all habeas petitions filed after the effective date of the act, April 24, 1996. Because McKissic filed his petition after the effective date, AEDPA's provisions govern this Court's review of his claims. See Gillard v. Mitchell, 445 F.3d 883, 889 (6th Cir. 2006). Under AEDPA, a petition for a writ of habeas corpus shall not be granted with respect to any claim adjudicated on the merits in state-court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or

involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding. 28 U.S.C. § 2254(d) (2006).

A state court's determination of a habeas petitioner's claim is "contrary to" clearly established federal law if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or (2) the state court confronts facts that are materially indistinguishable from relevant Supreme Court precedent and arrives at a different result. Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state-court decision is an "unreasonable application" of clearly established law if it (1) correctly identifies the legal rule from a Supreme Court case but unreasonably applies that rule to the facts of the particular case, or (2) either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context. Id. at 407.

This Court reviews the state court's factual findings with extreme deference. "A federal court is to apply a presumption of correctness to state court findings of fact for habeas corpus purposes unless clear and convincing evidence is offered to rebut this presumption." Johnson v. Luoma, 425 F.3d 318, 324 (6th Cir. 2005) (quoting McAdoo v. Elo, 365 F.3d 487, 493-94 (6th Cir. 2004)).

B. McKissic's Claims

1. Immunity

McKissic argues that he had immunity from the State's prosecution of the drug transactions he testified to in Patrick's legal proceedings and that his conviction therefore violates his constitutional right to be free from compelled self-incrimination. McKissic asserts that his immunity arises

from two sources: (a) a Michigan statute, Mich. Comp. Laws § 750.157 (1931), which provides for transactional immunity under certain conditions; and (b) his plea agreement with federal prosecutors. These are addressed in turn.

(a) Michigan Transactional-Immunity Statute

The Michigan transactional-immunity clause in effect when McKissic testified at Patrick's grand-jury proceeding in 1999 provided in relevant part as follows:

> No person shall be excused from attending and testifying . . . upon any investigation, proceeding or trial, for a violation of any of the provisions of this chapter [regarding criminal conspiracies], . . . for the reason that the testimony . . . required of him may tend to degrade or incriminate him; but no person shall be prosecuted or subjected to any penalty . . . on account of any . . . matter . . . concerning [that] which he may so testify. . ., and no testimony so given . . . shall be received against him upon any criminal investigation, proceeding or trial [;] provided, [t]hat no person so testifying shall be exempt from federal prosecution and punishment for perjury committed in so testifying.

Mich. Comp. Laws § 750.157, amended by 1999 PA No. 251 (1999). In other words, under the statute, a person may not refuse to testify in a proceeding related to a criminal conspiracy by invoking his or her right against self incrimination; at the same time, that person cannot be prosecuted for crimes (except for perjury) related to the testimony he or she provides. The statute thus provides for transactional immunity (which precludes prosecution for any event to which the person testifies) and not simply use immunity (which precludes only the use of the person's statements in a prosecution against the

person). See, e.g., United States v. Fitch, 964 F.2d 571, 575-76 (6th Cir. 1992) ("Transactional immunity is full immunity from prosecution for any offense to which the testimony relates," and it "prohibits the government from prosecuting the defendant at any time with respect to incriminating matters that the witness disclosed.") (citations omitted). McKissic argues that his testimony at Patrick's grand-jury proceedings falls under this statute and entitled him to transactional immunity, thus precluding prosecution for crimes relating to the drug-related conduct to which he testified. The Michigan Court of Appeals rejected this argument, concluding that the statute did not apply for two reasons.

First, the Michigan court explained that the statute provides immunity when the testimony at issue is "required" of the person. People v. McKissic (McKissic I), No. 224965, 2002 WL 408930, at *1 (Mich. Ct. App. Mar. 15, 2002). Because McKissic testified before Patrick's grand jury in accordance with his federal plea agreement, which he voluntarily entered into, the court concluded that his testimony was not required: "Voluntary cooperation in accordance with the terms of a plea agreement is not required testimony." Id. (citing United States v. Camp, 72 F.3d 759, 761 (9th Cir. 1995)).

McKissic objects to this holding on two grounds. First, based on an amendment to the statute, he contends that he is entitled to immunity even if his testimony was not compulsory. The statute was significantly amended in 1999 to provide use immunity instead of transactional immunity. The amended version referred to the applicable testimony as "required," but also as "compelled." n2 McKissic argues that because the word "compelled" did not appear in the earlier (applicable) version, testimony need not be "compelled" for immunity to apply. Thus, he suggests, the testimony he offered in accordance with his plea agreement -- even if that testimony was not compelled -- entitled him to immunity. Even assuming there is a difference between "required" and "compelled" testimony, n3 however, McKissic does not dispute that the applicable version

of the statute provides immunity where the testimony is "required," and he offers no basis to suggest the Michigan court's determination that his testimony was not "required" was contrary to, or an unreasonable application of, United States Supreme Court precedent. His argument is therefore without merit.

n2 The relevant section of the amended version of the statute provides as follows:

> A person shall not be excused from . . . testifying . . . before a court . . . upon an investigation, proceeding, or trial for a violation of this chapter on the ground that the testimony or evidence may tend to degrade or incriminate the person. Truthful testimony . . . compelled under this section and any information derived directly or indirectly from that truthful testimony . . . shall not be used against the witness in a criminal case, except for impeachment purposes or in a prosecution for perjury or otherwise failing to testify . . . as required.

Mich. Comp. Laws § 750.157 (1999) (emphasis added).

n3 We think there is no difference between "compelled" and "required" in this context. If the legislature intended "compelled" testimony to mean something other than "required" testimony, it likely would not have continued to use the word "required" (in addition to "compelled") when describing the testimony in the amended version. See Mich. Comp. Laws § 750.157 (1999), supra n.2. Moreover, the amendment did not amount to simply replacing one word for another (in which case the difference might be meaningful); rather, the amendment amounted to a significant overhaul of

the statutory text (to repeal transactional immunity and provide use immunity).

Second, McKissic argues that even if the statute applies to "required" testimony, he is still entitled to immunity because his testimony was not voluntary, but "required" by his federal plea agreement. Yet McKissic acknowledges that he voluntarily entered into the agreement, and he fails to offer any authority that testimony offered in accordance with a voluntary plea agreement (as opposed to, for example, testimony offered in response to a court order) is "required" within the meaning of the statute. We agree with the district court that the Michigan court's conclusion was not contrary to, or an unreasonable application of, United States Supreme Court precedent.

McKissic further argues that the state prosecutor compelled McKissic's testimony by making the following statement to him before he testified at Patrick's grand-jury proceeding: "With respect to the testimony that you give before this grand jury, nothing you say in that testimony will be used against you unless we find at some future time that you have lied before this grand jury." But this statement merely reiterated that McKissic was about to testify in accordance with his voluntary federal plea agreement. Immediately before making this statement, the prosecutor stated to McKissic that he was at Patrick's grand-jury proceedings "as part of a plea agreement with the federal authorities to testify before this grand jury," and McKissic indicated that was precisely the case. (Id. at 24, 26.) The prosecutor's statement does not change that McKissic voluntarily entered into the agreement. This argument is therefore also without merit.

The Michigan court's second reason for not applying the statute was McKissic's failure to invoke his right against self-incrimination before the grand jury, as he was required to do to avail himself of the statute. See McKissic I, 2002 WL 408930, at *2 ("[P]ersons are not entitled to statutory

transactional immunity unless they raise their constitutional privilege against self-incrimination or object to answering questions having the tendency to incriminate.") (citing People v. Parsons, 142 Mich. App. 751, 371 N.W.2d 440, 445 (Mich. Ct. App. 1985)). In light of our determination that McKissic's testimony was not "required" and therefore does not receive the protections of the transactional-immunity statute, we need not reach the question whether McKissic needed to invoke his right against self-incrimination and whether he failed to do so.

(b) Federal Plea Agreement

McKissic also argues that the prosecutor's statement to him at Patrick's grand-jury proceeding "acted as an immunity agreement." Because this statement amounted to the prosecutor merely reiterating that the forthcoming testimony was in accordance with the plea agreement, we understand McKissic to be arguing that, in addition to violating the Michigan statute, his prosecution violates his federal plea agreement.

Due process requires the government to adhere to the terms of any immunity agreement it makes. United States v. Fitch, 964 F.2d 571, 576 (6th Cir. 1992) (citing United States v. Pelletier, 898 F.2d 297, 302 (2d Cir. 1990)). If there is a breach of the immunity agreement, which is akin to a contract, the available remedies are those specified in the contract. Id. (citations omitted). We must first determine whether McKissic materially breached the agreement; if he did, we must then determine the remedies available to the government.

In Fitch, this Court affirmed the district court's ruling that the defendant did not materially breach his plea agreement. The defendant agreed to provide truthful information to the government in exchange for immunity, but then made contradictory statements to authorities that minimized his own involvement in criminal activity. Id. at 575. The defendant, however, assisted the government in securing indictments against other individuals. Id. Thus, this Court held that the

defendant did not materially breach the agreement because "the government received the benefit of its bargain." Id.

The Seventh Circuit illustrated the limits of Fitch in United States v. Reed, 272 F.3d 950 (7th Cir. 2001). Just as in Fitch, the defendant in Reed provided false information to the government after entering into an immunity agreement. See id. at 954. The Reed court explained, however, that "[u]nlike the instant case, the government in Fitch was able to use other information provided by the defendant to further the investigation." Id. at 955. "By contrast," the court continued, "not only did Reed seek to minimize his own wrongdoing, but he also attempted to avert the government's suspicions from [another defendant]." Id. In this way, the court explained, "Reed's violation thus denied the government the very benefit that the agreement was intended to secure -- information that would aid in the identification and prosecution of other [drug] traffickers." Id.

Just like the defendant's false statements in Reed, McKissic's contradictory testimony about Patrick was a material breach of the plea agreement. Unlike Fitch, in which the defendant -- notwithstanding his falsehoods -- still "supplied the government with enough information to allow it to secure a multicount indictment against numerous individuals" and "also assisted the government in various other ways," Fitch, 964 F.2d at 575, McKissic, like the defendant in Reed, provided information that would only hinder the prosecution of other individuals.

Having determined that McKissic materially breached the agreement, we turn to what remedy is available to the government. This Court in Fitch explained that even if there were a material breach of the immunity agreement, the government would be "limited to those remedies specified in the agreement." Id. at 575, Noting that although "there is caselaw that suggests that an immunity agreement is void upon the defendant's breach," we explained that "the courts have so

held only where the agreement explicitly provided that any falsehood would void the agreement. . . or where the agreement was silent as to remedies." Id. at 576 (citations omitted). Because the immunity agreement in Fitch "did not provide that it would be 'null and void' in the event [the defendant] lied, nor was it silent as to the consequences to [the defendant] of telling a lie," and instead provided that the defendant could be prosecuted for perjury only, the government was bound by that provision. Id. McKissic's plea agreement, on the other hand, expressly provided that it "shall be considered null and void" if McKissic breached and the government elected to terminate the agreement. The State therefore had authority to prosecute him for the underlying offenses. Cf. Reed, 272 F.3d at 955 (immunity agreement, "unlike the one in Fitch, expressly provided for its nullification in the event of a breach," so prosecution for underlying crimes was proper).

2. Pre-indictment Delay

McKissic next argues that his conviction is unconstitutional due to pre-indictment delay. McKissic asserts that although he was not charged with state crimes until April 1998, the State knew about his involvement in the cocaine-distribution network as early as 1994. In particular, McKissic argues that he was unable to mount an alibi defense because he "was stuck with fading memories of both state and defense witnesses."

A successful Due Process claim for pre-indictment delay requires that a petitioner establish (1) prejudice to his right to a fair trial, and (2) that the government intentionally caused the delay to gain a tactical advantage. United States v. Wright, 343 F.3d 849, 859 (6th Cir. 2003) (citing United States v. Brown, 667 F.2d 566, 567 (6th Cir. 1982)).

The Michigan Court of Appeals rejected McKissic's claim, holding that the prejudice resulting from pre-indictment delay must be actual and substantial and that the alleged imperfections of a witness's memory are generally insufficient

to establish actual and substantial prejudice. McKissic I, 2002 WL 408930, at *3. The district court agreed, concluding that the state court's determination that McKissic's "vague allegations of prejudice were insufficient to warrant reversal was not contrary to or an unreasonable application of Supreme Court precedent." McKissic II, slip. op. at 15.

We agree with the district court. Although McKissic indicates that the charges against him necessitated an alibi offense, he does not argue that he would have been able to bring an alibi defense if indicted earlier, describe the content of that alibi offense, or explain how the delay prevented him from bringing that defense. He argues only that the delay resulted in the loss of witnesses' memories. That conclusory argument is insufficient for showing prejudice. See Payne v. Rees, 738 F.2d 118, 121 (6th Cir. 1984). Moreover, even if he had established prejudice, McKissic has not shown that the delay was an intentional act by the government to gain a tactical advantage,

3. Prosecutorial Misconduct

McKissic next argues that the state engaged in misconduct by introducing the plea agreements of his co-defendants into evidence. According to McKissic, the prosecutor improperly sought admission of the plea agreements as evidence that the offenses occurred and that McKissic "must therefore be guilty as well." The State responds that this argument is procedurally defaulted because McKissic's trial attorney affirmatively stated at trial that he had no objection to the admission of the plea agreements.

For noncompliance with a state procedure to serve as a bar to habeas review, the state procedure must satisfy the standards set forth in Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986). Smith v. Ohio Dep't of Rehab. & Corr., F.3d , No. 04-4280, 2006 U.S. App. LEXIS 22843, at *9 (6th Cir. Sept. 8, 2006). First, there must be a state procedure in place that the petitioner failed to follow. Id. Second, the state court must have

actually denied consideration of the petitioner's claim on the ground of the state procedural default. Id. Third, the state procedural rule must bean "adequate and independent state ground" to preclude habeas review. Id. To be "adequate," a state procedural rule must be "firmly established and regularly followed." Id. at *10 (quoting Ford v. Georgia, 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991)). An "independent" state procedural rule is one not relying on federal law. Id. (citing Coleman v. Thompson, 501 U.S. 722, 732, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)). If these three factors are satisfied (thus imposing the procedural bar), the petitioner can overcome the procedural default by either "demonstrating cause for the procedural default and actual prejudice as a result of the alleged violation of federal law, or demonstrating that failure to consider the claims will result in a fundamental miscarriage of justice." Id. (quoting Coleman, 501 U.S. at 750).

The three Maupin standards for procedural default are satisfied here. First, McKissic does not dispute that his attorney's affirmative agreement to the introduction of the plea agreements constituted waiver of appellate review of this issue under Michigan law. See McKissic I, 2002 WL 408930, at *2 (citing People v. Carter, 462 Mich. 206, 612 N.W.2d 144, 149 (Mich. 2000)). Second, the Michigan Court of Appeals, the last state court to address this issue, denied this claim on that procedural ground. See id. Third, this procedural rule is an adequate and independent state ground. It is independent because it does not rely on federal law. It is adequate because it is firmly established and regularly followed by Michigan courts. See id. at 150 ("[C]ounsel expressly approved the trial court's response and subsequent instruction. This constitutes a waiver that extinguishes any error,"); People v. Riley, 465 Mich. 442, 636 N.W.2d.514, 518 (Mich. 2001) ("Because defendant waived, as opposed to forfeited, his rights under the rule, there is no 'error' to review."); People v. Tate, 244 Mich. App. 553, 559, 624 N.W.2d 524 (Mich. Ct. App. 2001) (same); People v. Brown, 2001 Mich. App. LEXIS 290, No. 222151,

2001 WL 1657240, at *1 (Mich. Ct. App. Dec. 18, 2001) (same); People v. Bridgewater, 2001 Mich. App. LEXIS 483, No. 212889, 2001 WL 664724, at *2 (Mich. Ct. App. May 18, 2001) (same).

McKissic does not contend he can show cause and prejudice for the default. And although he argues that the default will result in a fundamental miscarriage of justice, that would occur only if McKissic could show he was "actually innocent." Lundgren v. Mitchell, 440 F.3d 754, 764 (6th Cir. 2006) (citing Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). He fails to do so. We therefore agree with the district court that this claim is procedurally defaulted.

4. Double Jeopardy

Finally, McKissic argues that his conviction violates double-jeopardy principles because his convictions in state and federal court arose out of the same transactions. The Double Jeopardy Clause "protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense." United States v. Dinitz, 424 U.S. 600, 605, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976).

The Michigan Court of Appeals held that McKissic's state-court convictions did not violate the Double Jeopardy Clause because his federal drug-trafficking charges were dismissed under the plea agreement, and "[j]eopardy does not attach to charges dismissed as part of a plea agreement." McKissic I, 2002 WL 408930, at *3 (citation omitted). McKissic pleaded guilty to only the federal charge of money laundering. The Michigan court explained that pleading to this charge "raises no double jeopardy issues with respect to defendant's state court indictment for delivery, possession, and conspiracy to deliver cocaine." Id.

The district court determined that this conclusion was not contrary to, or an unreasonable application of, Supreme Court

precedent. McKissic II, slip op. at 17 ("[J]eopardy does not attach, and the constitutional prohibition can have no application, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge.") (quoting United States v. Toaz, 59 Fed. Appx. 94, 100 (6th Cir. 2003)). We agree with the district court; McKissic has been prosecuted only once for the convictions he appeals here. This claim is therefore without merit.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the order of the district court dismissing McKissic's petition for a writ of habeas corpus.

United States District Court
Eastern District of Michigan
Southern Division

LONNIE MCKISSIC

Petitioner,

Case Number: 03-75030

v.

HONORABLE PAUL D. BORMAN

THOMAS BIRKETT,

Respondent.

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS AND (2) DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY

I. INTRODUCTION

Petitioner Lonnie McKissic, through counsel, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated at the Standish Maximum Correctional Facility in Standish, Michigan, pursuant to three drug-related convictions. For the reasons set forth below, the Court DENIES the habeas-corpus petition.

II. Background

In February of 1994, Petitioner was indicted on federal charges, which included the delivery of over 650 grams of illegal drugs. In June of 1994, Petitioner reached a plea agreement with the federal prosecutor. Pursuant to that agreement, Petitioner was to plead guilty to a federal charge of money laundering and agree to cooperate with law-enforcement agencies regarding their investigation of past crimes, such as by providing truthful testimony at grand juries and at trial and

truthful answers to all investigators' questions. In return for Petitioner's cooperation, the United States Attorney agreed not to bring against Petitioner additional charges arising out of his distribution of cocaine in the Western District of Michigan; agreed to dismiss other charges pending against Petitioner, including a charge of conspiracy to distribute cocaine; and agreed to make certain sentencing recommendations.

In August of 1994, after pleading guilty to money laundering, Petitioner was sentenced to nine years in federal prison, following the federal prosecutor's recommendation of a downward departure in Petitioner's sentence. On February 28, 1995, Petitioner testified before a multi-county grand jury convened in Ingham County, Michigan. During his testimony, Petitioner implicated himself and Thomas Patrick ("Patrick") in the sales of large amounts of cocaine. In November of 1995, Petitioner was called in state court as a witness at Patrick's preliminary examination surrounding drug charges. Contradicting his grand jury testimony, Petitioner testified that Patrick had not been involved in any drug sales. Petitioner was also called to testify at Patrick's trial, where he again testified that Patrick had not been involved in any such drug sales.

In January of 1996, the United States Attorney moved to withdraw the downward departure in Petitioner's sentence on the federal money-laundering conviction on the ground that Petitioner had breached the plea agreement by not cooperating as promised.

In April of 1998, Petitioner was charged in Ingham County Circuit Court with perjury; delivery of more than 650 grams of cocaine; possession of more than 650 grams of cocaine; and conspiracy to deliver more than 650 grams of cocaine. The instant habeas-corpus petition surrounds the drug-related charges, not the perjury charge, which was the subject of a separate state-court proceeding.

Following a bench trial in Ingham County Circuit Court, Petitioner was convicted of delivery of more than 650 grams of cocaine, conspiracy to deliver more than 650 grams of cocaine, and possession with intent to deliver more than 650 grams of cocaine. On November 9, 1999, Petitioner was

sentenced as a four-time habitual offender to thirty to fifty years of imprisonment for the delivery conviction, twenty to thirty years of imprisonment for the conspiracy conviction, and twenty to thirty years of imprisonment for the possession conviction, to be served consecutively.

Petitioner filed an appeal of right in the Michigan Court of Appeals, presenting the following claims:

I. The trial court erred in denying the defendant's post-conviction motion to vacate the drug convictions/motion for new trial on the basis that the instant prosecution was barred by the then existing transactional immunity clause of M.C.L. 750.157 because, prior to trial, the defendant was required, pursuant to a federal court plea agreement, to testify before a multi-county grand jury about drug conspiracy transaction, which led to his convictions in this case.

II.. The prosecutor denied defendant a fair trial and improperly vouched for the credibility of prosecution witnesses when he introduced the entire guilty pleas of witnesses Bradley Young, Carl Rosario, and Rufus Jones, each of which arose out of the same and different criminal episodes for which defendant was on trial.

III. Defendant was denied a fair trial, when special agent Dennis Langkos and Lieutenant Rojeski were permitted to testify both as fact witnesses with respect to their involvement in this case, and as expert witnesses in drug investigations, thereby allowing the prosecutor to introduce "drug involvement profile evidence" as substantive evidence of defendant's guilt.

IV. The trial court improperly refused to dismiss the case as a violation of procedural due process when the defendant alleged that the delay in arrest of over two and one-half years deprived

him and witnesses of their memory and the prosecutor showed no explanation for the delay, did not show that the delay was unintentional, and did not demonstrate that no undue prejudice resulted from the delay.

V. Defendant's convictions in this case violated the state and federal bars against double jeopardy since the defendant was previously convicted in federal court for conduct which arose out of the same transactions that formed the basis for the convictions in this case.

VI. Defendant is entitled to have his presentence report amended and corrected copies sent to the Department of Corrections where the trial court acknowledge that certain challenged information would be stricken from and added to the presentence report, but the trial court either failed to completely strike or add the challenged information, or did not comply with M.C.L. 771.14(5), which requires that inaccurate information be completely stricken from the report.

The Michigan Court of Appeals affirmed Petitioner's convictions and sentences, and remanded the matter to the trial court for "complete obliteration of eliminated sections of" the presentence investigation report. People v. McKissic, No. 224965 (Mich.Ct.App.March 15, 2002).

Petitioner filed a delayed application for leave to appeal in the Michigan Supreme Court, presenting the claims presented as I through V in the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal. People v. McKissic, No. 121484 (Mich. Dec. 26, 2002).

Petitioner, through counsel, then filed the instant petition for a writ of habeas corpus in this Court, presenting the following claims, which he presented to both the state appellate courts:

I. The state prosecution in this case was barred by the then existing transactional immunity clause of M.C.L. 750.157 because, prior to trial, the defendant was required, pursuant to a federal court plea agreement, to testify before a multi-county grand jury about drug conspiracy transactions, which led to his convictions in this case.

II. The prosecutor denied Petitioner a fair trial and improperly vouched for the credibility of prosecution witnesses when he introduced the entire guilty pleas of witnesses Bradley Young, Carl Rosario, and Rufus Jones, each of which arose out of the same and different criminal episodes for which Petitioner was on trial.

III. Petitioner was denied a fair trial when special agent Dennis Langkos and Lieutenant Rojeski were permitted to testify both as facts witnesses with respect to their involvement in the case, and as expert witnesses in drug investigations, thereby allowing the prosecution to introduce "drug involvement profile evidence" as substantive evidence of the Petitioner's guilt.

IV. The trial court improperly refused to dismiss the case as a violation of procedural due process when the Petitioner alleged that the delay in arrest of over two and one-half years deprived him and witnesses of their memory and the prosecutor showed no explanation for the delay, did not show that the delay was unintentional, and did not demonstrate that no undue prejudice resulted from the delay.

V. Petitioner's convictions in this case violated the state and federal bars against double jeopardy

since the Petitioner was previously convicted in federal court for conduct which formed the basis for the convictions in this case.

III. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat.1214 ("AEDPA"), applies to all habeas petitions filed after the effective date of the act, April 24, 1996. Because Petitioner's application was filed after April 24, 1996, the provisions of the AEDPA, including the amended standard of review, apply to the instant petition.

28 U.S.C. § 2254(d) imposes the following standard of review on federal courts reviewing applications for a writ of habeas corpus:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Federal courts, therefore, are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an

unreasonable application of clear[1]ly-established federal law. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998). Additionally, federal courts must presume the correctness of state-court factual determinations. 28 U.S.C. § 2254(e)(1); *see also* Cremeans v. Chapleau, 62 F.3d 167,169 (6th Cir. 1995)("We give complete deference to state court findings unless the are clearly erroneous").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases . . . .
>
> A state court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 529 U.S. 362,405-06 (2000).

As to the "unreasonable application" clause of § 2254(d)(1), the Supreme Court held that a federal court should analyze a claim for relief under the "unreasonable application" clause when "a state court decision unreasonably applies the law of this Court to the facts of a prisoner's case." Id. at 409. The Court defined "unreasonable application" as follows:

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[1] USC § 2254(e)(1) provides, in pertinent part:

> In a proceeding instituted by an application for a wirt of habeas corpus by a person in custody pursuant to a judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable . . . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law . . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 410-11.

With this standard in mind, this Court proceeds to the merits of the pending habeas corpus petition.

IV. Analysis

A. Transaction Immunity Claim

Petitioner claims that he is entitled to habeas corpus relief because his prosecution in state court violated the transactional immunity clause of Mich. Comp. Laws § 750.157, thereby violating his constitutional right to be free of compelled self-incrimination. Pursuant to a plea agreement entered in federal court, Petitioner testified regarding a cocaine-distribution network in the Lansing, Michigan, area before a Multi-County Grand Jury in Ingham County Circuit Court. Petitioner was thereafter prosecuted in state court for crimes committed in connection with that Lansing area cocaine distribution network. While Petitioner's grand jury testimony was not admitted against him at trial, Petitioner argues that, in addition to use immunity, his grand jury testimony entitled him to transactional immunity.

The Michigan transactions immunity clause in effect at the time of Petitioner's grand jury testimony, stated, in pertinent part:

> No person shall be excused from attending and testifying, or producing any books, papers, or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this chapter, upon the ground or for reason that the testimony or evidence, documentary or otherwise, required of him may tend to degrade of incriminate him; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial: Provided, That no person shall be exempt from federal prosecution and punishment for perjury committed in so testifying.

Mich. Comp. Laws § 750.157, *amended by* 1999 PA No. 251 (1999).[2]

This clause was amended in 1999 PA No. 251, effective December 28, 1999. The amended statute states, in relevant part:

> A person shall not be excused from attending and testifying or producing any books, papers, or other document before a court or magistrate upon an investigation, procceding, or trial for a violation of this chapeter on the ground that the testimony or evidence may tend to degrade or incriminate the person. Turthful testimony, evidence, or other truthful information compelled under this section and any information derived directly or indirectly from that truthful

The Michigan Court of Appeals held that Petitioner's grand jury testimony did not entitle him to transactional immunity under Mich Comp. Laws § 750.157 because it was not required and because he failed to raise his constitutional privilege against self-incrimination. The court of appeals reasoned, in relevant part:

> Defendant first argues that the former version of M.C.L. 750.157 entitled him to transactions immunity from prosecution for these crimes because he was required to testify about these crimes before a grand jury pursuant to the terms of a federal plea agreement. We disagree.
>
> . . . .
>
> Because defendant testified before the grand jury pursuant to a plea agreement, his testimony was not "required" as required by M.C.L. 750.157. To be valid, a plea agreement must be voluntary. M.C.R. 6.302(A). Voluntary cooperation in accordance with the terms of a plea agreement is not required testimony. *See* United States v. Camp, 72 F.3d 759,761 (9th Cir. 1995) *cert. den.* 517 U.S. 1162; 116 S.Ct. 1557; 134 L.Ed.2d 658 (1996).
>
> Moreover, persons are not entitled to statutory immunity unless they raise their constitutional privilege against self incrimination or object to answering questions having a tendency to incriminate. People v. Parsons, 142 Mich.App. 751,762; 371 N.W.2d 440

> testimony, evidence or other truthful information shall not be used against the witness in a criminal case, except for impeachment purposes or in a prosecution for perjury or otherwise failing to testify or produce evidence as required.

Mich Comp Laws § 750.157.

(1985) . . . Immunity statutes are not self-executing. Parsons, *supra* at 761. Defendant failed to invoke his right against self-incrimination before the grand jury; therefore, defendant was not entitled to transactional immunity pursuant to M.C.L. 750.157.

McKissic, slip op. at 1-2.

Petitioner argues that the "trial court and the Court of Appeals erred in concluding that the Petitioner was not entitled to the transactional immunity contained in M.C.L. 750.157." (Pet'r brief at 21.) However, "[i]n order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable', the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510,519 (2003). "The state court's application must have been 'objectively unreasonable'." Id. "A federal court may not overrule a state court for simply holding a view different from its own." Mitchell v. Esparza, 540 U.S. 12,17 (2003).

In this case, Petitioner argues that the state court's decision was an unreasonable application of United States v. Monia, 317 U.S. 424 (1943). In Monia, the Supreme Court addressed whether a witness who, in compliance with a subpoena, appears before a grand jury inquiring into an alleged violation of the Sherman Act and gives testimony substantially touching the alleged offense obtains immunity from prosecution for that offense even though the witness did not assert his privilege against self incrimination.

The relevant sections of the Sherman Act provide: No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts (the Interstate Commerce Act, the Sherman Anti-trust Act, and other acts): Provided further, That no person so testifying shall be exempt from prosecution or

punishment for perjury committed in so testifying.

15 U.S.C. § 32.

> Under the immunity provisions [of the above Act and others] immunity shall extend only to aa natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

15 U.S.C. § 33.

The Supreme Court concluded that the plain terms of the Sherman Act "mean[] to the layman that if he is subpoenaed, and sworn, and testifies, he is to have immunity." Id. at 430. The clause at issue did not require the witness to claim the privilege before immunity would be conferred. Id.

Petitioner argues that the Supreme Court's decision in Monia compels the same conclusion in this case. However, the Court's decision addressed only the immunity that the Sherman Act affords an individual who was compelled, by issuance of subpoena, to appear before a grand jury. In this case, the Michigan Court of Appeals concluded that Petitioner was not "required" to appear before the grand jury because he apeared in connection with ta plea agreement. The Supreme Court did not specifically address this circumstance in Monia. This court believes that the state court's conclusion that Petitioner was not "required" to appear before the grand jury and that , consequently, automatic transactional immunity was not conferred on him, was not an unreasonable application of Monia. Petitioner points to no other Supreme Court precedent that would compel a different conclusion. The Court, therefore, denies habeas relief on this claim.

B. Alleged Prosecutorial Misconduct

In his second claim for habeas corpus relief, Petitioner

argues that he was denied a fair trial because the prosecutor engaged in misconduct. Specifically, Petitioner argues that the prosecutor improperly vouched for the credibility of prosecution witnesses when he introduced into evidence the entire plea agreements of three witnesses. Respondent argues that this claim is procedurally defaulted.

> The doctrine of procedural default provides:
> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent an adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if: 1) the state prisoner files a untimely appeal, Coleman, 501 U.S. at 750; 2) if he fails to present an issue to a state appellate court at his only opportunity to do so, Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994); or 3) if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection or to file a motion for a motion for a directed verdict, United States v. Frady, 456 U.S. 152, 167-69 (1982); Simpson v. Sparkman, 94 F.3d 199, 202 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." Rust, 17 F.3d at 162; Murray v. Carrier, 477 U.S. 478, 496 (1986).

For doctrine of procedural default to apply, a firmy-established state procedural rule applicable to the petitioner's claim must exist, and the petitioner must have failed to comply with that state procedural rule. Warner v United States, 975 F.2d 1207, 1213-14 (6th Cir. 1992), cert. denied, 507 U.S. 932

(1993). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. Coleman, 501 U.S. at 729-30. If the last state court from which the petitioner sought review affirmed the conviction both on the merits, and alternatively, on a procedural ground, the procedural default bar preclude a federal court's review of the habeas-corpus petition unless the petitioner establishes the requisite cause and prejudice. Rust, 17 F.3d at 161. If the last state court judgment contains no reasoning, but simply affirms the conviction in a standard order, the federal habeas court must look to the last reasoned state court judgment rejecting the federal claim and presume that later unexplained orders upholding the judgment rested upon the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

This Court begins its analysis of whether Petitioner's claim is procedurally defaulted by looking to the last reasoned state court judgment denying Petitioner's claim. *See* Coleman, 501 U.S. at 729-30. The last state court to address this claim, the Michigan Court of Appeals, held that the issue was precluded from appellate review because Petitioner's attorney stated that he had no objection to the introduction of each witness's plea agreement. McKissic, slip of. At 2. The state court's judgment clearly rested on a procedural bar and the doctrine of procedural default applies.

Petitioner fails to assert cause to excuse such procedural default. He also fails to demonstrate that the failure to consider this claim will result in a fundamental miscarriage of justice. Therefore, Petitioner's prosecutorial misconduct claim is barred from federal habeas review because it is procedurally defaulted.

C. Admission of Drug Profile Evidence

Petitioner claims that the trial court violated his right to a fair trial and due process when it admitted drug-profile evidence. The Michigan Court of Appeals held that, which the

evidence was improperly admitted, the error was harmless and reversal, therefore, was not required. McKissic, slip op. At 2-3. In reaching this decision, the Michigan Court of Appeals noted that the evidence against Petitioner was overwhelming.

On habeas review, to determine whether an error was harmless, a federal court must determine whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); *quoting* Kotteakos v. United States, 328 U.S. 750, 776 (1946). Considering the properly admitted evidence against Petitioner, the Court concludes that the improperly admitted drug-profile evidence did not have a substantial and infurious effect in determining the verdict. Thus, Petitioner has failed to show that admission of this evidence entitles him to habeas relief.

D. Pre-Arrest Delay

In his fourth claim for habeas corpus relief, Petitioner alleges that the delay in arresting him violated his right to due process. Petitioner claims that approximately two years elapsed between the incident giving rise to Petitioner's arrest and his ultimate arrest.

The Due Process Clause of the Fifth Amendment affords a defendant limited protection against preindictment delay. U.S. v. Lovasco, 431 U.S. 783, 789 (1977); see also United States v. Marion, 404 U.S. 307, 324 (1971). In determining whether a preindictment delay violates due process, a court must decide whether the delay "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions... and which define the community's sense of fair play and decency." Lovasco 431 U.S. at 790 (internal quotations omitted). "In order to prevail on a claim of unconstitutional pre-indictment delay, a defendant must demonstrate that he suffered substantial prejudice to his defense as a result of the delay and the the prosecution intentionally delayed to gain a tactical advantage over him." , 53 Fed. Appx. 335, 336 (6th Cir. 2002) (citing

Lovasco, 431 U.S. at 790).

The last state court to issue a reasoned opinion regarding this claim, the Michigan Court of Appeals, held in pertinent part:

> A challenge to a pre-arrest delay implicates constitutional due process rights, reviewed de novo by this Court...To establish a due process violation in the context of pre-arrest delay, the defendant bears the initial burden of establishing prejudice to the defendant's right to a fair trial. People v. Herndon, 246 Mich. App. 371, 390; 633 N.W. 2d 376 (2001). The prejudice must be actual and substantial, meaningfully impairing the defendant's ability to defend against the charges in a manner likely to affect the outcome of the proceedings... Alleged imperfections of a witness's memory are generally insufficient to establish actual and substantial prejudice...
>
> Defendant fails to demonstrate any prejudice affecting the outcome of the proceeding. Instead, he relies on general allegations of dimming memories and loss of exculpatory evidence. These general allegations are insufficient to warrant reversal...

McKissic, slip op. at 3.

Supreme Court precedent supports the state court's conclusion the Petitioner's vague allegations of dimming memories were insufficient to establish prejudice. In Marion, the Supreme Court held:

> Appellees rely solely on the real possibility of prejudice inherent in any extended delay; that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment.

404 U.S. at 325-36.

In this case, Petitioner does not allege that he was prosecute in violation of the applicable statute of limitations. Therefore, the Court concludes that the state court's finding that Petitioner's vague allegations of prejudice were insufficient to warrant reversal was not contrary to or an unreasonable application of Supreme Court precedent. The Court denies habeas relief on this claim.

E. Alleged Double Jeopardy Violation

Lastly, Petitioner claims that his convictions violate the Double Jeopardy Clause because his convictions in state and federal court arose out of the same transactions. The Double Jeopardy Clause "protects a defendant in a criminal proceedings against multiple punishments or repeated prosecutions for the same offense." U.S. v. Dinitz, 424 U.S. 600, 605 (1976).

The Michigan Court of Appeals held that Petitioner's state-court convictions did not violate the Double Jeopardy Clause, stating, in pertinent part:

Defendant next argues that his prosecution violated the prohibition against double jeopardy because he was previously convicted in federal court for conduct also forming the basis for the convictions in this case. We disagree.

...Pursuant to his plea agreement, defendant pleaded guilty to one count of money laundering. The other federal charges were dismissed. "Jeopardy does not attach to charges dismissed as part of a plea agreement." People v. Mezy, 453 Mich.269, 276; 551 N.W.2d 389 (1996). Therefore, a prosecution on charges dismissed pursuant to a plea agreement does not violate the Double Jeopardy Clause where the newly charged offense is different than the crime to which the defendant pleaded guilty. Mezy, *supra*, 453 Mich. At 275, citing United States v. Garner, 32 F.3d 1305, 1311 n.6 (8th Cir. 1994), *cert. denied* 514 U.S. 1020; 115 S. Ct. 1366; 131 L. Ed.

2d. 222 (1995). Defendant's federal conviction for money laundering raises no double jeopardy issues with respect to defendant's state court indictment for delivery, possession, and conspiracy to deliver cocaine.

McKissic, slip op.at 3-4.

"The Double Jeopardy Clause has no application unless jeopardy has attached." United States v. Toaz, 59 Fed. Appx.94, 100 (6th Cir. 2003) (citing Serfass v. United States, 420 U.S. 377, 388 (1975)). "'[J]eopardy does not attach, and the constitutional prohibition can have no application, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge.'" Id. (quoting Serfass, 420 U.S. at 388) (additional internal quotation marks omitted).

Under circumstances analogous to those in the pending case, the United States Court of Appeals for the Sixth Circuit found no double jeopardy violation. In Toaz, the defendant was indicted in the United States District Court for the Northern District of Indiana for conspiring to distribute and to posess with the intent to distribute controlled substances in violation of 21 U.S.C. §§ 841(a) and 846. Pursuant to a plea agreement reached before trial, the defendant pleaded guilty to interstate travel in aid of racketeering in violation of the Travel Act, 18 U.S.C. § 1952. The conspiracy count was dismissed pursuant to the plea agreement. Id. at 100. Subsequently, the defendant was convicted in the United States District Court for the Western District of Michigan of conspiracy to unlawfully distribute and to possess with intent to distribute methamphetamine. The defendant argued that the Michigan-federal-court conviction violated the Double Jeopardy Clause because the actions that formed the basis for the Indiana-federal-court conspiracy charge and the Michigan-federal-court conspiracy charge were part of one conspiracy. Id.

The Sixth Circuit Court of Appeals held that jeopardy never attached to the Indiana-federal-court conspiracy charge because the charge was dismissed. The Court reasoned that, because "[n]o jury was empaneled or sworn to hear the Indiana

conspiracy charge, no court heard evidence on the charge and . . .{the defendant] never pleaded guilty to it," the defendant was never put in jeopardy for that offense. Id. Thus, the Court of Appeals found no double jeopardy violation.

In the pending case, no jury was impaneled or sworn to hear the federal conspiracy charge, no court heard evidence on the charge, and Petitioner never pleaded guilty to it. Thus, the Court concludes that the Michigan Court of Appeals' conclusion that jeopardy never attached to that charge was not contrary to or an unreasonable application of Supreme Court precedent. Habeas relief is denied on this claim.

F. Certificate of Appealability

Finally, the Court addresses whether Petitioner is entitled to the issuance of a certificate of appealability. Before Petitioner may appeal the Court's dispositive decision dismissing his petition, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App.P. 22(b).

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). A petitioner satisfied the substantial-showing standard when he demonstrates "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). When a prisoner's habeas corpus petition was denied on procedural grounds, a certificate of appealability "should issue . . . if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

The Court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); In re Certificates of Appealability, 106 F.3d 1306, 1307 (6th Cir. 1997).

In this case, the Court holds that jurists of reason would not find debatable or wrong its conclusion that the foregoing

claims do not warrant habeas corpus relief. Accordingly, the Court holds that Petitioner is not entitled to a certificate of appealability.

V. Conclusion

Fore the foregoing reasons, the Court DISMISSES WITH PREJUDICE the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2244(d)(1)(A). The Count further DECLINES to issue a certificate of appealability.

SO ORDERED.

PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: February 24, 2005
Detroit, Michigan